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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

I. INTRODUCTION

Defendants Newark Police Department, Joseph Dale Wren and Jim Davis (“City”) admittedly are dashing to reach the gangplank before the procedural ship sails: three other parties also have scheduled motions to dismiss for June 25, 2008. Unfortunately, the 35-day requirement for notice prior to hearing may demand that this motion be heard on the date specified above, rather than June 25.

Notwithstanding inefficiencies of timing, the City defendants' motion essentially duplicates that of the other defendants: be it due to *res judicata* or the statute of limitations, the plaintiff's complaint is doomed.

II. FACTUAL BACKGROUND

The “factual background” has been well-summarized in Judge Breyer’s Memorandum and Order of June 25, 2007. It will be repeated, though without resort to quotation marks:

4 At approximately 8:20 a.m. on June 12, 2004, Newark Police Officers Joseph Wren
5 ("Officer Wren") and Farley were dispatched to investigate an accident involving a pedestrian
6 and a bicyclist at the Eureka Circle Course in Newark, California. When Officer Wren arrived at
7 the scene, he noticed that the roadway had been closed for a bicycle race. Officer Wren noticed
8 that plaintiff Cornelius Lopes, with a mangled face, was sitting on the curb. Lopes told Officer
9 Wren that he was confused about what had happened, but confirmed that he had been running in
10 the roadway in the opposite direction of the bicycle racers. Lopes made no other statements to
11 Officer Wren and was eventually transported by ambulance to Washington Hospital. Prior to this
12 incident, Officer Wren had never met nor heard of plaintiff Lopes.

Officer Wren spoke to various witnesses at the scene. Byron Sheppard reported that he had been directly behind the bicyclist that collided with Lopes and that he had observed Lopes run directly into the group of bicyclists and hold his right arm out to the side, level to the ground, and strike the bicyclist in the middle of the chest. Officer Wren also spoke with bicyclist Bob Parker, the bicyclist that collided with Lopes. Parker stated that he did not see Lopes prior to the accident. Another bicyclist who was involved in the accident did not see or hear what caused the collision.

Officer Wren also spoke with Jason Sage. Sage reported that Lopes had been warned to stay off the roadway and that Sage had been told that on one occasion Lopes had responded something to the effect of "F--- You Jew."

23 The next day Officer Wren spoke with Lopes. Lopes denied that he had warned him to
24 stay off the course. He also denied that he had argued with any of the bicyclists or stuck his arm
25 out while jogging to interfere with the bicyclists. Later that day, Lopes faxed a written statement
26 to Officer Wren. According to Officer Farley's police report, upon his arrival at the scene

1 Officer Farley spoke with witness Peter Rosa. Rosa reported that Lopes had intentionally
 2 collided with the bicyclists.

3 On June 14, 2004, Officer Wren prepared a written police report that included the above
 4 information, as well as Lopes' written statement. Officer Wren concluded that the report should
 5 be sent to the Alameda County District Attorney for review and filing of "PC 242" (battery)
 6 charges against Lopes. Officer Wren concluded: "Victims, Parker and Rath believe this Act was
 7 intentional on Lopes behalf. They requested that a report covering the details of this incident be
 8 sent to the DA's office." The District Attorneys' Office subsequently asked the Newark Police
 9 Department to obtain further information. In connection with this further investigation, witness
 10 Jason Sage sent Officer Wren additional written witness statements and a CD. Several of the
 11 witnesses asserted in their written statements that they had told Lopes to exit the bicycle course.
 12 In addition, witness Tim O'Hara asserted that when he politely asked Lopes to leave the course,
 13 Lopes responded: "F___ You, Jew." Officer Wren submitted both the written statements and the
 14 CD to the District Attorney's Office.

15 On July 6, 2004, the District Attorney's Office asked Officer Wren to locate the bicyclist
 16 that had collided with Lopes. Officer Wren produced a second supplemental report identifying
 17 Bob Parker as the struck bicyclist. Officer Wren's submission of the supplemental report ended
 18 his participation in the case. He never met nor spoke with any District Attorney's Office
 19 representative concerning whether to file charges against Lopes or issue an arrest warrant.

20 On July 15, 2004, Alameda County Deputy District Attorney Lisa Faria asked Newark
 21 Police Sergeant Robert Douglas to author a "Declaration in Support of Arrest and/or Issuance of
 22 Warrant of Arrest" ("Declaration") to accompany the District Attorney's criminal complaint for
 23 an arrest warrant against Lopes. Prior to the request from Faria, Sergeant Douglas had never met
 24 nor spoken with a representative of the District Attorney's Office concerning whether to file
 25 charges against Lopes. Sergeant Douglas read the criminal complaint and Officer Wren's police
 26 report with supplements and concurred that probable cause existed to arrest Lopes. Accordingly,
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1 he prepared and signed the Declaration. Once he submitted the Declaration, his involvement
 2 with Lopes' case ended.

3 On July 16, 2004, a criminal complaint and arrest warrant were issued charging Lopes
 4 with misdemeanor battery arising from the June 12, 2004 collision. Lopes was not convicted of
 5 the charges.

6 III. PROCEDURAL HISTORY

7 A. The Criminal Prosecution

8 Because of its implications for causes of action within the plaintiff's present lawsuit, one
 9 should be aware that the criminal complaint and arrest warrant for misdemeanor battery were issued
 10 on July 15, 2004. (Defendants' Nolan, et al., Request for Judicial Notice, Exhibit A, incorporated
 11 herein by this reference.) Following a "hung jury," the charges were dismissed on October 12,
 12 2005. (Id., Exhibit B, also incorporated herein by this reference.)

13 B. The First Lawsuit

14 On June 9, 2006 the plaintiff sued (United States District Court docket number C06-
 15 03705CRB), among others, present City defendants Newark Police Department and Officer Joseph
 16 D. Wren (note: that cast did not include present defendant Jim Davis). His complaint contained
 17 nine "Claims" (sometimes called "Counts"), though, as Judge Breyer remarked in his
 18 Memorandum (4:11-12), "it is difficult to discern the exact nature of his claims." The extent to
 19 which those "Claims" correlate with the plaintiff's present array is discussed below (5:18-6:8).

20 By Judge Breyer's Memorandum of June 25, 2007, all Claims/Counts against the City
 21 defendants were eliminated by summary judgment.

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1 C. The Present Lawsuit

2 Following its filing in Alameda Superior Court on November 2, 2007, the plaintiff's lawsuit
 3 was removed to the Northern District on December 7, 2007. As amended, it contains a
 4 monumental 18 causes of action against 33 defendants.¹

5 The plaintiff charges these moving defendants diversely:

- 6 • Count 5 (Jim Davis, et al.) for having "recklessly published false information that
 the plaintiff had committed a crime" which resulted in his having been "charged
 with two counts of battery plus a hate crime."²
- 7 • Count 8 (Jim Davis, et al.) for 42 U.S.C. section 1985 due to "depriving Plaintiff
 equal protection under the law and equal privileges and immunities."
- 8 • Count 9 (Joseph Wren) for an incomplete investigation, which thereby did
 "deprive Plaintiff of his due process rights."
- 9 • Count 11 (Newark Police Department and Joseph Wren) for having "run afoul of
 the Establishment Clause by [having] 'Hate Crime' checked in the police report."
- 10 • Count 12 (Jim Davis and Joseph Wren) by having participated in a "private
 conspiracy" which "deprived the Plaintiff" of his Thirteenth and Fourteenth
 Amendment rights.
- 11 • Count 13 (Newark Police Department and Joseph Wren) to declare "the State
 [criminal] proceeding as invalid."
- 12 • Count 18 (Jim Davis and Joseph Wren) for "malicious prosecution", evidently
 under state law.

24 ¹ On December 13, 2007 – i.e., within one week following removal – defendant CB Richard
 25 Ellis, Inc. moved to dismiss pursuant to Rule 12(b)(6) also on the grounds of *res judicata* and the
 26 statute of limitations. The motion was granted on March 10, 2008.

27 ² In reviewing the aforementioned Exhibits A and B, the reader will recognize that the plaintiff
 never was charged with any "hate crime." The charges consisted only of two counts of
 California Penal Code §242 (battery).

1 Four of these causes of action echo those in the first complaint. As summarized by Judge
 2 Breyer, they consist of the following:

- 3 • “In ‘Claim 1’ [the plaintiff] appears to contend that...[Wren’s] police report
 4 violates the Establishment Clause.” [See above, Count 11.]
- 5 • “In ‘Claim 2’ [the plaintiff] contends that Wren conspired with others to obtain
 6 plaintiff’s arrest warrant without probable cause.” (In addition, though not
 7 specified by Judge Breyer, “Count 3” alleged that “the defendants (sic) private
 8 conspiracies deprived the plaintiff of equal protection...” [See above, Count 12.¹]
- 9 • “In ‘Claim 3’ [the plaintiff] alleges that Officer ‘Wren recklessly published false
 10 information’...” [See above, Count 5, now omitting Officer Wren but including,
 11 for the first time, Jim Davis.]
- 12 • Claim 2’s text also specified that “defendant Joseph Wren lead (sic) an
 13 incomplete investigation regarding [the] accident...[which did] deprive plaintiff
 14 of his due process rights.” [See above, Count 9.]

15 In sum, five of the seven “Counts” now asserted against the City defendants are repetitions
 16 of those previously adjudicated (with the addition, as it were, of Mr. Davis in four of them). It does
 17 not require much imagination to anticipate the effects of *res judicata*...

18 IV. THE EFFECT OF RES JUDICATA (COUNTS 5, 8, 9, 11 AND 12)

19 It hardly will be a revelation to learn that “[r]es judicata, also known as claim preclusion,
 20 bars litigation in a subsequent action of any claims that were raised or could have been raised in the
 21 prior action.” (*Owens v. Kaiser Foundation Health Plan, Inc.* (9th Cir. 2001) 244 F.3d 708, 713,
 22 quoting from *W. Radio Servs. Co. v. Glickman* (9th Cir. 1997) 123 F.3d 1189, 1192.) It has been
 23 further explained that “[t]he doctrine is applicable whenever there is ‘(1) an identity of claims, (2) a

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 26 ¹ It is worthy of note that, in his Opposition to summary judgment (filed June 8, 2007), the
 27 plaintiff explicitly argued that allegations of “conspiracy” were, at least in part, based on 42
 U.S.C. section 1985. He now does so again, though it is explicitly part of his current complaint
 (see “Count 8”).

1 final judgment on the merits, and (3) identity or privity between the parties'." (*Owens*, supra, at
 2 713, quoting from *W. Radio*, at 1192.)

3 Notwithstanding the three criteria, "[t]he central criterion in determining whether there is an
 4 identity of claims between the first and second adjudications is whether the two suits arise out of
 5 the same transactional nucleus of facts." (*Owen*, supra, at 714, quoting from *Frank v. United*
 6 *Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 851.)

7 Without question, the plaintiff's lawsuits all "arise out of the same transactional nucleus of
 8 facts": namely, the investigation and subsequent prosecution of the plaintiff pertaining to the
 9 discrete incident between the plaintiff and the bicyclists on the morning of June 12, 2004. Bluntly,
 10 none of the City defendants seems to have had any contact with or knowledge of the plaintiff but
 11 for the bicycle race incident and its aftermath. So is the "central criterion" amply satisfied. (In
 12 addition, the claims truly are identical in the main; where they are not in text, they are in both
 13 essence and intent.)

14 Last, Judge Breyer's summary judgment decision, with the subsequent entry of judgment
 15 itself, is indisputably "a final judgment on the merits."

16 By the time of the conclusion of the criminal charges (by dismissal on October 12, 2005),
 17 there were no further events or facts to evolve. Therefore, all such facts, participants, claims,
 18 grievances, etc., were (or certainly should have been) known to the plaintiff by the time he brought
 19 his first lawsuit on June 9, 2006. Same people, same events, same facts: *res judicata*.

20 V. THE EFFECT OF THE STATUTES OF LIMITATION

21 A. The Federal Claims

22 Because section 1983 does not specify a limitations period within which to bring an action,
 23 the applicable limitation is that which governs personal injuries in the state where the action arose.
 24 (*Owens v. Okure* (1989) 488 U.S. 235, 238; *Wilson v. Garcia* (1985) 471 U.S. 261, 275.) Section
 25 1983 contentions are to be characterized as personal injury actions for statute of limitations
 26 purposes and are governed by the state's general or residual personal injury statute of limitations.

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1 (*McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668, 672; *Gibson v. United States* (9th
 2 Cir. 1986) 781 F.2d 1334, 1338.)

3 Until 2002, California's applicable statute of limitations was one year, by virtue of its
 4 general or residual personal injury statute (Code of Civil Procedure §340(3)). (*McDougal*, *supra*, at
 5 672.) As of January 1, 2002, the period was increased to two years (Code of Civil Procedure
 6 §335.1).

7 Therefore, the plaintiff's 1983 claims (including those which properly should be: Counts 9,
 8 11 and 12) can encompass only those which accrued during the period June 12, 2004-June 12,
 9 2006. As the present lawsuit was filed on November 2, 2007, the plaintiff's federal claims are tardy
 10 by almost 17 months.

11 B. The State Claims

12 Of course, as the statute of limitations for the federal claims is the state statute of
 13 limitations, so any plaintiff's cause of action (Count 18?) based on state law is stale by the exact
 14 same measure of time.

15 VI. CONCLUSION

16 By now, the court has long since decided if any of the plaintiff's "Counts" can survive
 17 either *res judicata* or the statute of limitations. Presumably, the result of this motion will be the
 18 same as the others.

19 However, the plaintiff has had abundant opportunity to litigate his grievances. That time
 20 has passed. As it has, so should this most recent lawsuit.

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 22 Date: June 2, 2008

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23
 24 /s/

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